92-988
-No. _____

Supreme Court, U.S.
FILED
DEC 8 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

KATHLEEN LEISHMAN-DONALDSON, WILLIAM J. DiGIOVANNI and JOHN A. BECKER, Individually and in their Official Capacities as Bailiff and Deputy Bailiffs of the Shaker Heights Municipal Court,

Petitioners,

vs.

RONALD F. BALAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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57 pp

QUESTION PRESENTED

Whether municipal court bailiffs, who perform a court-ordered investigation into the qualifications of an alcohol counselor appointed by the court to monitor a defendant sentenced to such counseling in a criminal proceeding, are assisting the court in its performance of a judicial function, and therefore are entitled to absolute quasi-judicial immunity from liability for acts occurring during that investigation.

LIST OF PARTIES

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Kathleen Leishman-Donaldson, William J. DiGiovanni, and John A. Becker, in their individual capacities, hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Appendix at 1a to 12a) is not reported. The opinion of the United States District Court for the Northern District of Ohio, denying petitioners' Motion to Dismiss, or in the Alternative for Summary Judgment, (Appendix at 13a to 19a) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 9, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person

> within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Additional Ohio statutory provisions, which are somewhat lengthy, are contained in the Appendix at 20a to 22a.

STATEMENT OF THE CASE

This civil action was originally filed by the plaintiff-respondent Ronald F. Balas ("Balas") in the Court of Common Pleas for Cuyahoga County, Ohio on March 7, 1991. The complaint sought damages from The City of Shaker Heights, Ohio and three bailiffs of the Shaker Heights Municipal Court – petitioners Kathleen Leishman-Donaldson, William J. DiGiovanni and John A. Becker (hereinafter referred to collectively as "the bailiffs") – in connection with a court-ordered investigation into Balas' qualifications to serve as an alcohol counselor as part of a criminal sentence in the case of *City of Pepper Pike v. Weiner*, Shaker Heights Municipal Court, Case No. 89-TRD-22904. The bailiffs were all sued in their official and individual capacities. Because the complaint raised a federal constitutional issue, alleging that the plaintiff had been "abridged rights secured to him by the Constitution of the United States and the State of Ohio," the defendants removed the case to the United States District Court for the Northern District of Ohio pursuant to 28 U.S.C. §§ 1441, *et seq.*, and 28 U.S.C. § 1331.

Balas' claims arise out of his involvement in the sentencing of a criminal defendant, Joel Weiner, who was charged in the Shaker Heights Municipal Court with driving under the influence of alcohol. Balas was the director of an organization known as "Kids in Crisis," which purported to counsel troubled youths. Weiner and Balas were friends and associates prior to Weiner's arrest; Weiner served as chairman of Kids in Crisis' fund-raising committee. Balas had also developed a congenial relationship with the only Judge of the Shaker Heights Municipal Court, Judge Paul R. Donaldson.[1]

Apparently hoping to gain some advantage from Balas' relationship with Judge Donaldson, Weiner and his attorney convinced Balas to attend Weiner's sentencing hearing and appear on Weiner's behalf. Balas was presented to the court by Weiner's attorney as "Dr. Balas," and the court was told that "Dr. Balas" was attending the hearing despite the fact that he was scheduled to attend a meeting of the Ohio Board of Mental Retardation, of which he was said to be the chairman. Balas presented the court with a business card identifying himself as "Ronald F. Balas, Ph.D." The court sentenced Weiner to a fine and probation, and, at the suggestion of Weiner's attorney, mandated that Weiner undergo alcohol counseling with "Dr. Balas" for six months. Sentencing Weiner to seek counseling with Balas departed from Judge Donaldson's usual practice of sentencing convicted drunk drivers to attend Alcoholics Anonymous meetings.

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[1] Judge Donaldson is married to defendant Kathleen Leishman-Donaldson. Ms. Leishman-Donaldson serves as Judge Donaldson's chief bailiff.

Subsequently, the court determined that Weiner's sentence should be reevaluated. The motive for this action is somewhat disputed. The bailiffs argue the court became aware that Balas was not actually a doctor, and in fact, was not licensed to perform alcohol counseling services. Therefore the intent of Weiner's sentence was not being carried out. Balas argues that Judge Donaldson and Ms. Leishman-Donaldson were angered by Balas' unflattering psychological diagnosis in an unrelated situation concerning Ms. Leishman-Donaldson's niece, and that Judge Donaldson and Ms. Leishman-Donaldson were merely seeking revenge on Balas. Whatever the reason, the court ordered the bailiffs to investigate Balas' qualifications and background to determine whether he was properly assigned to serve as Weiner's alcohol counselor as part of Weiner's criminal sentence.

The bailiffs performed a thorough investigation of Balas' credentials. They contacted state and local medical and psychological boards and found that Balas was not a physician, psychologist or licensed alcohol counselor, and that his counseling organization, Kids in Crisis, was not licensed to perform alcohol counseling. They contacted the Ohio Board of Mental Retardation and found that, not only was Balas not the chairman as was represented to the court during the Weiner sentencing hearing, the organization had no knowledge of Balas' existence. The bailiffs obtained documents from various public agencies, such as the Ohio Secretary of State's office and the Ohio Attorney General's office, which showed that Balas had constantly held himself out as "Dr. Ronald Balas" or "Ronald Balas, Ph.D" on publicly filed documents. They sought out his educational records which showed that

Balas did not have a graduate degree at all, and that he consistently overstated his educational achievements. They talked with local and state prosecutors who had investigated Balas in the past for possible violations of the charitable organization laws. In sum, the bailiffs' court-ordered investigation confirmed the court's fears that Balas was not legally or professionally qualified to carry out the terms of Weiner's sentence, and that the basic intent of the court's sentence would be frustrated by Balas' inability to provide Weiner with effective alcohol counseling.

The court set a hearing to resentence Weiner. The court compelled a number of private citizens, some of them Balas' friends or acquaintances, to appear at the hearing and give testimony concerning Balas' qualifications. The bailiffs personally served the witnesses with "summonses" to appear at the hearing. The court later indicated at the hearing that the summonses were the result of a clerical error and should have been subpoenas, and that none of the witnesses were being charged with any criminal offenses. The witnesses who appeared before the court answered questions from the city prosecutor regarding Balas. Weiner testified that Balas never really counseled him following the sentence, suggesting rather that Weiner "get some reading material." Following the hearing, the court revised Weiner's sentence and required Weiner to attend Alcoholics Anonymous meetings for the remaining two months of his probation, finding that the previous sentence did not include any certified alcohol counseling. As a result of the resentencing and the publicity surrounding Balas' questionable credentials, Balas was forced to resign as the director of

Kids in Crisis and claims to have suffered significant reputational damage and emotional distress.

Balas brought this case against Shaker Heights and the bailiffs approximately one year later. Balas claims that the investigation was undertaken without probable cause and maliciously, and constituted an invasion of his constitutionally protected right of privacy. Balas also claims that the bailiffs made defamatory comments to the witnesses while they were serving the subpoenas and charges the bailiffs with abuse of process, malicious prosecution, intentional interference with employment, conspiracy and infliction of emotional distress.

After removing the case to federal court, the bailiffs moved to dismiss, or in the alternative for summary judgment, on Balas' claims against them in their individual capacities. In support of their motion, the bailiffs submitted the court file in the *Weiner* case and the results of their investigation. The bailiffs argued that they investigated Balas pursuant to a court order and were gathering information to be used by the court at the sentencing stage of a criminal proceeding, thereby serving a function integral to the judicial process. Thus, the bailiffs claimed to be protected by the doctrine of absolute judicial immunity.

The district court denied the motion. The district court stated that the bailiffs would be entitled to judicial immunity if they were engaging "in a quasi-judicial function or under the direction of Judge Donaldson," but not if they were acting in "an investigative role, an administrative capacity or without authority." The district court considered the role played by the bailiffs to be a factual

issue incapable of being determined at the summary judgment stage.

Pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the bailiffs appealed the district courts' denial of the immunity motion to the Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the district court ruling in a *per curiam* opinion, with the following analysis:

> When determining whether someone should be employed or continued as a probation officer or equivalent, or be selected to counsel or supervise a criminal defendant, the judge is not acting in a judicial capacity and the court personnel who perform that function are not acting in a quasi-judicial capacity. Most of the activity complained of in this case falls into this category. Thus, to the extent they were investigating Balas, there is no absolute immunity. However, when a judge seeks to determine whether a defendant is complying with the terms of probation, the judge is performing a judicial function. To the extent court personnel were investigating whether Weiner was complying with the terms of his probation, they were performing a quasi-judicial function. To the extent defendants were performing that function at the direction of the judge, they are entitled to quasi-judicial immunity.

Appendix at 11a to 12a. The Sixth Circuit concluded that the district court was correct to require further factual development in order to determine which, if any, of the defendants' acts were protected by absolute judicial immunity.

ARGUMENT

It is well established that judges are absolutely immune from liability in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, or if the act is alleged to have been done maliciously or corruptly. *Mireles v. Waco*, 112 S. Ct. 286, 288 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967). This Court has also made it clear that others who "perform functions closely associated with the judicial process," *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1980), are entitled to absolute immunity. *See Butz v. Economou*, 438 U.S. 478, 511 (1978) (federal hearing examiners, administrative law judges and agency lawyers practicing in a federal administrative hearing); *Yaselli v. Goff*, 275 U.S. 503 (1927) (*aff'g* 12 F.2d 396 (1926)) (federal prosecutors); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (state prosecutors); *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (witnesses). This Court has also noted, without negative comment, that lower courts have granted grand jurors and state parole officials absolute immunity. *See Imbler*, 424 U.S. at 423 n. 20 (noting the "almost equally venerable common-law tenet" of absolute immunity for grand jurors); *Cleavinger*, 474 U.S. at 200-201 (collecting federal appeals court decisions granting state parole officials absolute immunity).

This case presents the question of whether court bailiffs performing a court-ordered investigation into the qualifications of an alcohol counselor, previously appointed by the court to monitor a defendant as part of a criminal sentence, are performing a "function closely associated with the judicial process" such that they are entitled to absolute quasi-judicial immunity from liability

for acts occurring during the investigation. This Court has never specifically addressed whether judicial immunity extends to court officers who perform acts at the request of a judge, although several lower federal courts have held that it does. Nor has this Court specifically addressed the issue of whether a judge is performing a judicial function when he or she investigates the qualifications or effectiveness of a private citizen who becomes intertwined with the judicial process. Both of these questions are directly raised by the facts of this case, and both are sufficiently important to the future availability of the judicial or quasi-judicial immunity defense to merit this Court's attention. Even if this Court's comment were not required on these subjects, the Sixth Circuit's decision is most assuredly an uneven and detrimental addition to the body of judicial immunity case law. Its potential effect on the proper application of judicial immunity principles by future courts is an additional reason for this Court to accept this case for review.

I. ABSOLUTE IMMUNITY SHOULD BE EXTENDED TO OFFICIALS INVOLVED IN A COURT-ORDERED INVESTIGATION PERFORMED IN CONNECTION WITH A CRIMINAL SENTENCE.

The municipal court was performing a function closely associated with the judicial process when it ordered an investigation of Balas' qualifications as part of the ongoing sentencing process in the *Weiner* case. Accordingly, the bailiffs who performed the investigation at the request of the court should be entitled to absolute quasi-judicial immunity. This Court's prior decisions,

while not explicitly reaching this conclusion, anticipate its ultimate adoption as law.

Absolute judicial immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson*, 386 U.S. at 554; *Bradley v. Fischer*, 80 U.S. (13 Wall) 335, 350 (1872). Absolute judicial immunity was not abrogated by Congress in the enactment of 42 U.S.C. § 1983. *See Stump*, 435 U.S at 356; *Pierson*, 386 U.S. at 554-555. Absolute judicial immunity, like absolute prosecutorial immunity, is viewed by this Court's decisions "as necessary to protect the judicial process." *See Burns v. Reed*, 111 S. Ct. 1934, 1938 (1991).

In *Forrester v. White*, 484 U.S. 219 (1988), this Court summarized the rationale underlying absolute judicial immunity:

> The purposes served by judicial immunity from liability have been variously described. In *Bradley v. Fischer*, [80 U.S. at 348], and again in *Pierson v. Ray*, [386 U.S. at 554], the Court emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. . . . If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. . . . The resulting timidity would be hard to detect or

> control, and it would manifestly detract from independent and impartial adjudication.

Forrester, 484 U.S. at 226-227 (full citations omitted).

This Court's decisions have set forth a "functional" approach to absolute judicial immunity wherein "absolute immunity flows not from rank or title or 'location within the government' . . . but from the nature of the responsibilities of the individual official." *Cleavinger*, 474 U.S. at 201 (quoting *Butz*, 438 U.S. at 511). In *Mireles* and *Stump*, this Court set forth the standard to be applied in determining whether an act is "judicial" under the "functional" analysis:

> [W]hether an act by a judge is a "judicial" one relates to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

Mireles, 112 S. Ct. at 288; *Stump*, 435 U.S. at 362. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982) ("the judicial, prosecutorial, and legislative functions require absolute immunity"); *Butz*, 438 U.S. at 512-513 ("adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in it should also be immune from damages"); *Imbler*, 424 U.S. at 430 (activities of state court prosecutor in deciding whether to institute charges and in role as advocate were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force"). *Compare Forrester*, 484 U.S. at 229 (judge acting in administrative, not judicial, capacity in making decision

to discharge court employee). Stated another way, a judge will not be deprived of liability because the action taken was in excess of his or her authority; rather the judge will only be subject to liability when he or she has acted in the "clear absence of all jurisdiction." *Stump*, 435 U.S. at 356-57 (quoting *Bradley*, 80 U.S. at 351).

Proper application of this standard requires that the particular act in question not be scrutinized in isolation, but rather in "relation to a *general function normally performed by a judge.*" *Mireles*, 112 S. Ct. at 288-89 (emphasis added). In *Mireles*, this Court held that a judge who ordered two police officers to use excessive force in securing an attorney's presence in his courtroom for court business was absolutely immune from liability. This Court recognized that although the judge's specific directive to use excessive force was not a function normally performed by a judge, "if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a 'nonjudicial' act, because an improper or erroneous act cannot be said to be normally performed by a judge." *Mireles*, 112 S. Ct. at 288. "A judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge" *Mireles*, 112 S. Ct. at 288.[2]

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[2] This Court noted that the judge's actions were within the broad grant of power available to California courts to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." *Mireles*, 112 S. Ct. at 288 n.2 (quoting CAL. CIV. PROC. CODE § 128 (West Supp. 1991)).

This Court's decisions employing the "functional" analysis have distinguished between acts that are truly acts within the judicial process, and thus protected by absolute immunity, and administrative acts, outside the context of a judicial proceeding, that simply happen to be performed by judges. In *Forrester*, for example, this Court held that a judge was not protected from liability by absolute judicial immunity for firing a probation officer, on the basis that "the decisions at issue . . . were not themselves judicial or adjudicative." *Forrester*, 484 U.S. at 229. And in *Burns*, the Court held that a prosecutor was not protected by absolute immunity for providing legal advice to police officers regarding probable cause. "We do not believe . . . that advising the police *in the investigative phase* of a criminal case is so 'intimately associated *with the judicial phase* of the criminal process' . . . that it qualifies for absolute judicial immunity." *Burns*, 111 S. Ct. at 1943 (emphasis added, citation omitted).

On their face, the actions taken by the municipal court in this case are "intimately associated with the judicial phase of the criminal process" and were not done in "clear absence of all jurisdiction."[3] The court had

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[3] Ohio municipal courts have a similar statutory grant of power as the California court at issue in *Mireles*. An Ohio municipal court has the power, in any action or proceeding over which it has jurisdiction, "[t]o issue process, preserve order, and punish contempts, . . . and to exercise such other powers as are necessary to give effect to the jurisdiction of the court and to enforce its judgements, orders, or decrees." *See* OHIO REV. CODE ANN. § 1901.13(A) (Page 1983 and Supp. 1991) (reproduced at Appendix 20a). *See also* OHIO REV. CODE ANN. § 1901.21(A) and § 1907.18(B) (Page 1983 and Supp. 1991) (reproduced at Appendix 20a to 21a).

sentenced a criminal defendant to a fine, probation and mandatory alcohol counseling. The court appointed the counselor who was requested *by the defendant* at the sentencing hearing to perform that counseling. The court later determined, prior to the expiration of the sentence, that the qualifications of the counselor were suspect and needed to be examined more closely.[4] An investigation was performed by court officials, at the court's behest, which confirmed the court's suspicions. Accordingly, the criminal defendant's sentence was modified. All the while the various individuals "dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362. It is difficult to imagine a series of actions more intimately associated with the judicial phase of the criminal process.

Nonetheless, both lower courts concluded that at least some of the acts complained of were not "judicial."[5]

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[4] There is some dispute as to the "real" motivation for the court's decision to order the investigation. However, this Court's decisions make it quite clear that the applicability of absolute judicial immunity depends on the function being performed, not the presence or absence of a good faith basis for the actions taken. Thus, this particular factual dispute is immaterial to the determination of the judicial immunity issue.

[5] Both courts also concluded that further factual development was necessary. This is simply untrue. For the purposes of Fed. R. Civ. P. 12 and 56, the rules pursuant to which the bailiffs sought dismissal, the facts are to be construed in favor of the plaintiff. Thus there is no "factual dispute." The facts are as Balas presents them, at least for purposes of this appeal. Moreover, there is no dispute that the bailiffs' investigation was performed at the request of the court (although there may be some dispute as to whether the investigation was the subject of an actual journal entry), there is no dispute that Balas' qualifications were misrepresented to the court at the *Weiner* hearing,

Each opinion suggests that the lower courts considered every individual action taken by the various court officials and evaluated whether it, taken alone, was a judicial or administrative act. For example, the Sixth Circuit concluded that "[m]ost of the activity complained of in this case falls into this category [of determining whether someone should be employed as a probation officer or selected to counsel a criminal defendant]," and is therefore administrative and not deserving of absolute immunity, while other acts were deemed deserving of judicial immunity. Appendix at 12a. This analysis runs counter to this Court's admonition in *Mireles* that one should not scrutinize merely "the particular act in question," but should consider "the particular act's relation to a general function normally performed by a judge. . . . " *Mireles*, 112 S. Ct. at 288-89. When the municipal court's actions are analyzed individually under the microscope, one can imagine at least some of the acts appear less than judicial. However, when viewed as a whole, as this Court's precedent requires, the court's actions are closely related to the quintessential judicial function of criminal sentencing and must be considered judicial functions for which absolute immunity applies.

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and there is no dispute that Weiner's sentence was modified following the investigation. The factual disputes arise merely in the severity of the bailiffs' acts performed in the context of the investigation and the damage they allegedly caused, factors essentially irrelevant to a determination of the absolute immunity issue.

II. THE SIXTH CIRCUIT OPINION SIGNIFICANTLY AND UNNECESSARILY EXTENDS THIS COURT'S DECISIONS IN *BURNS V. REED* AND *FORRESTER V. WHITE*.

The Sixth Circuit's opinion drifts far from the guidance this Court provided in *Burns v. Reed* and *Forrester v. White* and threatens to frustrate future courts in their efforts to resolve claims involving the judicial immunity defense. Specifically, the Sixth Circuit places far too much value on the concept of "investigation," apparently emboldened by this Court's finding in *Burns* that a prosecutor's advice to the police at the investigative stage of a criminal case did not deserve absolute immunity. The lower court also mistakenly applies this Court's doctrine regarding a judge's rudimentary employment decisions, as articulated in *Forrester*, to the clearly judicial acts taken in this case.

In reaching its decision that the bailiffs' acts are not deserving of absolute immunity, the Sixth Circuit apparently concluded that an "investigation" of Balas simply cannot be judicial in nature, stating at one point that "to the extent [the bailiffs] were investigating Balas, there is no absolute immunity." Appendix at 12a. This analysis extends this Court's decision in *Burns* beyond its rational limits and creates a new rule of law that all investigations undertaken by a court (or by the court's staff at the court's direction) are administrative functions irrespective of their context.

The Sixth Circuit's fixation on the concept of an "investigation" is further evidenced by its reliance upon *Achterhof v. Selvaggio*, 886 F.2d 836 (6th Cir. 1989), decided

before this Court's decision in *Burns*, where the Sixth Circuit held that absolute immunity did not apply to a social worker who initiated a child abuse investigation. The Sixth Circuit held there that:

> despite the possibility that criminal prosecution might have resulted from Selvaggio's investigation, his decision to 'open a case' was not entitled to absolute immunity. This decision was only investigatory or administrative in nature, not prosecutorial, judicial, or otherwise intimately related to the judicial process. Selvaggio did not initiate any court action in the role of a prosecutor, nor did he sit as a judge in an adversary proceeding. His work was investigatory.

Achterhof, 886 F.2d at 830.

The Sixth Circuit's reliance on *Achterhof* in this case, where the underlying facts are not even remotely similar, is wholly inconsistent with the functional approach to absolute immunity mandated by this Court. Rather than examining the function performed by the bailiffs' investigation, the Sixth Circuit attempts to conflate all "investigations," whatever their context, into the same category of administrative acts deserving only qualified immunity.

This case is readily distinguishable from *Burns*. The investigation was not initiated in a vacuum, or in anticipation of a possible criminal prosecution; thus *Burns* does not control. The investigation undertaken was part and parcel of a criminal sentencing clearly within the jurisdiction of the municipal court. Considered within its proper context, the investigation performed by the bailiffs is still a judicial function, despite the fact that it can admittedly be categorized as an "investigation." The Sixth Circuit's

rule that all investigations are administrative acts, regardless of their place in the judicial process, should be rejected.

The Sixth Circuit also appears to rely on the principles of *Forrester* to an unwarranted degree, although *Forrester* is not directly invoked, when it states that "determining whether someone should be employed or continued as a probation officer or equivalent, or be selected to counsel or supervise a criminal defendant" is not a judicial function. Appendix at 11a to 12a. This Court in *Forrester* determined that mere employment decisions by a judge are not protected by absolute immunity. However, the Sixth Circuit's casual extension of *Forrester* from employment decisions to the selection of a person to counsel or supervise a criminal defendant is unwarranted. The Court in *Forrester* noted that, in making employment decisions, a judge is performing a function which is performed by many non-judicial public officials; the policies behind absolute judicial immunity do not apply to such acts. *Forrester*, 484 U.S. at 229. However, only a judge can decide who will be appointed to supervise or counsel a criminal defendant as part of a criminal sentence and under what circumstances that sentence will be modified. The underlying policies behind absolute immunity apply with full force to such activities.

As a practical matter, this case is quite different from *Forrester*. Balas is not a court employee and is not on the court payroll. The municipal court was not making a simple employment decision when it ordered the investigation into Balas' qualifications. Balas' qualifications were examined to determine his capability under Ohio law to serve as Weiner's alcohol counselor as part of a

valid sentence in a pending criminal proceeding.[6] This Court's teachings in *Forrester* are clearly inapplicable to this case, and the Sixth Circuit's attempt to recast the municipal court's investigation of Balas as a rudimentary employment decision undeserving of absolute judicial immunity will only serve to confuse the state of the law.

III. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS REGARDING THE IMMUNITY OF COURT EMPLOYEES.

The Sixth Circuit's decision appears to conflict with a line of cases decided by a number of federal circuits regarding the availability of the absolute quasi-judicial immunity defense to court employees either performing judicial acts, as an arm of the judge, or ministerial acts pursuant to a court order. This Court should accept review of this case in order to resolve this conflict.

Several lower federal circuits have found that probation and parole officers, whose work is closely associated with the judicial functions of the courts and is characterized by the need for discretion in decision-making, including the conducting of investigations as a part of the judicial process, are absolutely immune from liability for

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[6] Ohio law prohibits a court from sentencing a convicted drunk driver to alcohol counseling in lieu of a jail sentence unless the counseling program and its counselors comply with statutorily mandated minimum standards. *See* OHIO REV. CODE ANN. § 4511.99(A)(7) (Page 1990 and Supp. 1991) and OHIO REV. CODE ANN. § 3793.10 (Page 1992) (reproduced in the Appendix at 21a to 22a).

their acts. *See, e.g., Dorman v. Higgins*, 821 F.2d 133 (2d Cir. 1987) (United States probation officer entitled to absolute immunity from liability in suit alleging preparation of a false probation report); *Tripati v. United States Immigration Service*, 784 F.2d 345 (9th Cir. 1986) (United States probation officer immune from liability for alleged false statements in pretrial bond report and presentence report); *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1986) (state probation officer absolutely immune from liability for alleged preparation of false presentencing report that purportedly resulted in improperly long sentence); *Hughes v. Chessner*, 731 F.2d 1489 (11th Cir. 1984) (same); *Sellars v. Procunier*, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981) (state parole officers entitled to absolute immunity); *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979) (United States probation officers absolutely immune from civil liability for alleged misconduct in investigation and preparation of presentence report).

In *Demoran*, the Ninth Circuit applied the "functional" test to state probation officers and stated:

> Probation officers preparing presentencing reports serve a function integral to the independent judicial process. Like parole board members, they act as "an arm of the sentencing judge." . . . The duty of these probation officers is to engage in impartial fact-gathering for the sentencing judge. The officer is required by law to "investigate and report to the court . . . upon the circumstances of the crime and the prior history and record of the person, which may be considered *either in aggravation or mitigation of the punishment.*" The prospect of damage liability under section 1983 would seriously erode

> the officer's ability to carry out his independent fact-finding function and thereby impair the sentencing judge's ability to carry out his judicial duties.

Demoran, 781 F.2d at 157-158 (citation omitted, emphasis in original).

In *Sellars*, cited by this Court with some degree of approval in *Cleavinger*, the Ninth Circuit also stated:

> We believe that parole board officials perform functionally comparable tasks to judges when they decide to grant, deny, or revoke parole. The daily task of both judges and parole board officials is the adjudication of specific cases or controversies. Their duty is often the same: to render impartial decisions in cases and controversies that excite strong feelings because the litigant's liberty is at stake. They face the same risk of constant unfounded suits by those disappointed by the parole board's decisions.

Sellars, 641 F.2d at 1303. This Court noted that the parole board members at issue in *Sellars* were accurately described as "an arm of the sentencing judge." *Cleavinger*, 474 U.S. at 204 (quoting *Sellars*, 641 F.2d at 1302 n. 15).

Furthermore, in *Dorman*, the Second Circuit acknowledged that "some discretion must be exercised by the [probation officer] in his decision of what to report to the court." *Dorman*, 821 F.2d at 137. The Ninth Circuit in *Demoran* also noted the procedural safeguards that surrounded the filing of a presentencing report, including review by the sentencing judge and the availability of direct appellate review and the writ of habeas corpus.

Demoran, 781 F.2d at 158. *See also Sellars*, 641 F.2d at 1303-1304.[7]

Court officials and employees have also been held absolutely immune from civil liability when they act under the explicit direction of a judge or under the command of a court decree, even when they are performing a purely ministerial task. *See, e.g., Dellenbach v. Letsinger*, 889 F.2d 755, 762-763 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990) (absolute immunity attaches to court reporters who, under direction of state court judge, required criminal defendant to pay for trial transcript); *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989) (sheriff's deputies absolutely immune from liability for arresting and incarcerating trial spectator pursuant to judge's order); *Coverdell v. Department of Social and Health Services*, 834 F.2d 758 (9th Cir. 1987) (social worker absolutely immune from liability in suit arising out of worker's apprehension of child pursuant to court order); *Property Management & Investment, Inc. v. Lewis*, 752 F.2d 599 (11th Cir. 1985) (receiver of corporation protected by judicial immunity in carrying out orders of appointing judge); *Tymiak v. Omodt*, 676 F.2d 306 (8th Cir. 1982) (sheriff who

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[7] Many of the same safeguards are available in this case. The investigation resulted in an evidentiary hearing on the record, and the witnesses were available to Weiner's counsel for cross-examination. The modification of sentence, and procedure used to effect it, could have been appealed. Moreover, if Balas truly believed the municipal court was acting on matters outside its jurisdiction, he could have sought a writ of prohibition against further action by the court. *See, e.g., Commercial Savings Bank v. Wyandot County Court of Common Pleas*, 35 Ohio St. 3d 192, 519 N.E.2d 647 (1988).

evicted plaintiff from home in compliance with court order held entitled to absolute immunity from liability); *Slotnik v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980) (court clerk who filled out criminal commitment papers absolutely immune from liability when carrying out official directives of state court judge). *See also, Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981) ("absolute immunity applies where a court clerk is acting under the command of a court decree or explicit instructions from a judge); *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980) ("A clerk 'may receive immunity in his own right for the performance of a discretionary act or he may be covered by the immunity afforded the judge because he is performing a ministerial function at the direction of the judge") (quoting *Waits v. McGowan*, 516 F.2d 203, 206 (3rd Cir. 1975)).

In reaching this result, the circuits have recognized that absolute judicial immunity is a primary means of protecting the judicial process. In *Valdez*, the Tenth Circuit stated:

> absolute immunity for officials assigned to carry out a judge's order is necessary to insure that such officials can perform their function without the need to secure permanent legal counsel. A lesser degree of immunity could impair the judicial process.
>
> * * *
>
> To force officials performing ministerial acts intimately related to the judicial process to answer in court every time a litigant believes the judge acted improperly is unacceptable. Officials must not be called upon to answer for the

> legality of decisions which they are powerless to control. . . . [I]t is simply unfair to spare the judges who give orders while punishing the officers who obey them. Denying these officials absolute immunity for their acts would make them a 'lightning rod for harassing litigation aimed at judicial orders.'

Valdez, 878 F.2d at 1288 and 1289 (citation omitted).

The Sixth Circuit's decision conflicts with both these lines of cases. The bailiffs' investigation was closely associated with the judicial functions of the court and required them to perform much the same sort of investigation a probation officer would perform when considering what sentence to recommend, or the investigation a parole officer would perform when considering whether to modify a criminal defendant's sentence. Simply put, they were acting as the "arms of the sentencing judge." Despite the long line of circuit court cases which grant similar "arms" absolute judicial immunity, the Sixth Circuit's decision denies the bailiffs the appropriate level of protection.

In addition, the bailiffs performed their investigation at the request of the judge who commands them. Under Ohio law, the duty of a municipal court bailiff is to perform such duties as are prescribed by the court. *See* OHIO REV. CODE ANN. § 1901.32(A)(6) (Page 1983 and Supp. 1991) (reproduced in the Appendix at 20a). The bailiffs were duty bound to perform their investigation despite the possible repercussions. The reasoning of the court below has the practical effect of imposing potential liability upon municipal court bailiffs for doing what they are required to do by statute. The Sixth Circuit's decision

directly conflicts with other circuits who have protected similar court employees from lawsuits by invoking the absolute judicial immunity doctrine.

IV. THIS COURT'S GUIDANCE IS REQUIRED TO SOLIDIFY THE JUDICIAL IMMUNITY DOCTRINE AS IT RELATES TO A COURT'S TREATMENT AND EVALUATION OF PRIVATE CITIZENS WHO BECOME INTEGRAL PARTS OF THE JUDICIAL PROCESS.

Ultimately, the success of the judicial immunity doctrine rests on its clarity. If courts and court employees are unable to determine whether they will be subjected to vexatious lawsuits as a result of their activities because the boundaries of the "judicial" function designation are unclear, they will be more careful and circumspect than their positions of public responsibility require. If persons who feel aggrieved by the actions of a judge or a court employee do not clearly understand when the protections of the judicial immunity doctrine apply, unnecessary and burdensome lawsuits will be filed. And if reviewing courts are unable to ascertain in the early stages of litigation whether the acts of a judge or a court employee are "judicial" and hence protected by absolute immunity, these same lawsuits will continue to advanced stages, occupying the court official with the burdens of litigation rather than his or her public duties.

As this Court has noted, the scope of judicial immunity is "not perfectly well defined." *Forrester*, 484 U.S. at 226. If the Sixth Circuit's decision is any indication, that unfortunate lack of clarity is particularly troublesome when applied to a situation where a court attempts to

evaluate, through an investigation performed by its officers, whether a private citizen should be given, or should retain, an integral role in the judicial process. This is a situation which faces courts daily.

Courts, like the municipal court in the *Weiner* case, which are required by state law to sentence drunk driving defendants to sessions with a licensed counselor, must constantly reevaluate whether a given counselor, many times a private individual with no permanent connection with the court, is adequately effecting the court's sentences. Similarly, a court might be required to place a child in foster care at the conclusion of a domestic dispute or a case involving alleged sexual abuse. This may require the court or its officials to investigate whether the proposed foster environment, often a private household, is capable of providing an appropriate level of care for the aggrieved child.

These are but a few of the examples where the judicial functions of a court are inextricably intertwined with private citizens who become integral parts of the judicial process. While responsible activity by such private citizens can aid the overburdened judicial system in performing its ultimate function, irresponsible activity by private citizens who offer to aid the court frustrates the effective disposition of the individual cases involved and damages the overall public perception of the legal system as a whole. A court must be permitted to examine the qualifications and abilities of private citizens on which the court relies to perform its day-to-day judicial function.

However, if a court or its officers cannot be certain that their efforts to evaluate carefully the qualifications of private citizens who are chosen to become part of the judicial process will be protected by absolute judicial immunity, they will be deterred from vigorous activity on behalf of the system's integrity. This Court should accept this case for review in order to clarify the doctrines of absolute judicial and quasi-judicial immunity so that court officers will not be deterred by uncertainty about the scope of their legal protection.

CONCLUSION

The municipal court bailiffs' court-ordered investigation was intimately associated with the judicial phase of the criminal process. As arms of the sentencing judge, the bailiffs were engaged in a uniquely judicial function, and are entitled to the protections of absolute judicial immunity.

This case presents this Court the opportunity to clarify whether court officers who perform a court-ordered investigation in the context of the modification of a criminal sentence are performing a judicial function, and to confirm the wisdom of the many circuit court decisions which hold that court officers are entitled to absolute quasi-judicial immunity when performing acts on behalf of or at the command of the court. Accordingly, petitioners request that the Court issue a writ of certiorari to

the Sixth Circuit Court of Appeals to review its judgment in the instant case.

Respectfully submitted,

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APPENDIX A

NO. 91 4073

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD F. BALAS,

Plaintiff-Appellee,

v.

KATHLEEN LEISHMAN-DONALDSON, WILLIAM J. DiGIOVANNI, and JOHN A. BECKER, Individually and in their official capacities as Bailiff and Deputy Bailiffs of the Shaker Heights Municipal Court,

Defendants-Appellants,

CITY OF SHAKER HEIGHTS, OHIO,

Defendant.

On Interlocutory Appeal from the United States District Court for the Northern District of Ohio.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is reproduced.*

[Filed September 9, 1992]

BEFORE: KENNEDY and SILER, Circuit Judges; and JOINER, Senior District Judge.*

PER CURIAM. Defendants Kathleen Leishman-Donaldson, William DiGiovanni, and John Becker, bailiffs of the Shaker Heights Municipal Court, bring this interlocutory appeal from the district court's order denying their motions to dismiss or, in the alternative, for summary judgment. Plaintiff, Ronald F. Balas, initiated this action in state court alleging that defendants had tortiously conducted an unauthorized highly intrusive investigation of him, and violated his rights as protected by the Ohio and federal constitutions. Defendants removed the case and a motion to remand was denied. Defendants' motions for dismissal or summary judgment were premised on the argument that as municipal court bailiffs they were shielded from suit by absolute judicial immunity. The motion was denied.

Our jurisdiction is established by 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action"). We affirm.

*** Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.**

I.

Defendant Leishman-Donaldson is chief bailiff in the court of her husband, Shaker Heights Municipal Court Judge Paul Donaldson. In December 1989, Judge Donaldson conducted a sentencing hearing in the case *City of Pepper Pike v. Joel A. Weiner*. Weiner had been convicted of driving under the influence of alcohol. Judge Donaldson's sentencing policy regarding first-time offenders such as Weiner was, among other things, to require attendance at Alcoholics Anonymous meetings. At his sentencing hearing, Weiner requested that Judge Donaldson order counselling not with Alcoholics Anonymous but with Balas, with whom Weiner had worked at a charitable organization known as "Kids in Crisis."[1] The record indicates that both Judge Donaldson and Leishman-Donaldson had come into contact with Weiner in the past and, after Weiner testified that Balas had the requisite professional licensing to conduct substance abuse counselling, Judge Donaldson honored Weiner's request.

Some weeks after this sentencing hearing, the alleged investigation of Balas was conducted. The parties offer different explanations as to the goals of the investigation and the defendants' motivation. Defendants contend that Chief Bailiff Leishman-Donaldson became aware that Balas was not licensed to conduct substance abuse counselling and that he had been fraudulently representing himself as a licensed psychologist (accepting references to

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[1] Plaintiff had apparently set up Kids in Crisis as a non-profit center for the counselling of "at risk" youth.

himself as "doctor") at the hearing before Judge Donaldson. Therefore, defendants contend, their investigation of Balas was a properly authorized "sentencing investigation" intended to determine whether a fraud upon the municipal court had been committed. Balas, on the other hand, characterizes the investigation as motivated entirely by personal animus. Balas stated that he had been retained by Judge Donaldson and Leishman-Donaldson to evaluate one of their relatives who was experiencing some substance abuse and/or emotional difficulties. After consulting with the relative's treating psychologist, Balas informed Judge Donaldson and Leishman-Donaldson that it was his belief that the relative was a possible victim of inter-family abuse. Having made this uncomfortable diagnosis implicating a relative in wrongdoing, the investigation of Balas was, in his view, begun in order to embarrass and harass him. Some unflattering details of the investigation were revealed to the press by Judge Donaldson.

While conducting the investigation, defendants sought to verify each of the professional affiliations which Balas allegedly had claimed, and conducted personal interviews with individuals whom they believed to be acquainted with Balas. The results of the investigation were turned over to the Shaker Heights prosecuting attorney.

Following the investigation, an extraordinary examination of the individuals identified by defendants as associates or acquaintances of Balas was conducted by Judge Donaldson as part of a resentencing hearing for Weiner. Six of these individuals were summoned to appear before Judge Donaldson, and were questioned by

the prosecuting attorney. The summonses issued for these individuals were apparently signed by Leishman-Donaldson, although she had no authority to do so. Balas contends that defendants roamed the community with blank summonses, serving all individuals whom they believed to be in any way connected with Balas, and making defamatory statements about him as they went. From the bench, Judge Donaldson converted the "summonses" to subpoenas.[2] The six individuals were questioned by the prosecuting attorney. Subsequent to the resentencing hearing, Judge Donaldson filed a complaint with the Shaker Heights Police Department charging Balas with contempt and obstruction of official business. Balas was not prosecuted.

This action began when Balas filed a complaint in the Ohio Court of Common Pleas alleging seven state tort causes of action: (1) invasion of privacy, (2) abuse of process, (3) malicious prosecution, (4) defamation, (5) intentional interference with employment, (6) conspiracy, and (7) emotional distress. In detailing the invasion of privacy count Balas alleged:

> 60. Upon information and belief, plaintiff alleges that Leishman's investigation of plaintiff unlawfully intruded into his private affairs and

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[2] The record indicates that at the time of the resentencing hearing, no affidavit or complaint had been filed against Balas and, therefore, no summonses could have been issued. Ohio Rev. Code § 2935.09. However, the record also reveals that Judge Donaldson had characterized Balas as the "target" of the resentencing hearing. Balas appeared at the resentencing hearing by filing a notice of special appearance and a motion to specify charges.

> abridged rights secured to him by the Constitution of the United States and the State of Ohio.
>
> 61. Upon information and belief, plaintiff alleges that Leishman's investigation was conducted under color of law and was manifestly outside the scope of her employment and official responsibilities.

(App. at 29). These allegations were incorporated by reference within the remaining counts of the complaint, and formed the basis of defendants' removal petition. The district court granted the petition, finding that the alleged deprivation of rights secured by the federal constitution under color of state law constituted an alleged violation of 42 U.S.C. § 1983.

Following removal of the case, defendants filed their motions for dismissal or, in the alternative, summary judgment, based on the defense of absolute judicial immunity. The district court found that dismissal was inappropriate as plaintiff had articulated facts which, if proven, would preclude the defense of absolute immunity. After reviewing the law on the availability of absolute judicial immunity, the district court found that the defense was based upon a factual determination of the nature of the function being served by defendants in conducting their investigation of plaintiff. Therefore, the court concluded that the issue could not be resolved by summary judgment.

Defendants renew their contentions that they were clothed in absolute judicia! immunity because (1) in investigating plaintiff they were acting pursuant to court order, and (2) that in conducting a court-ordered sentencing investigation they were acting as an arm of the court

and serving a function integral to the judicial process. As a threshold matter, plaintiff contends that the district court lacked subject matter jurisdiction and that this action was improperly removed, and asks for an order of remand. We first address the jurisdiction argument.

II.

In pertinent part, 28 U.S.C. § 1441 (b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

The general federal question statute, 28 U.S.C. § 1331, provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." A cause of action satisfies the "arising under" requirement of the statute only when plaintiff's well-pleaded complaint raises an issue of federal law. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988), *cert. dismissed*, ___ S. Ct. ___, 60 U.S.L.W. 3447, 61 U.S.L.W. 3059 (1992); *Striff v. Mason*, 849 F.2d 240, 242 (6th Cir. 1988). In assessing the existence of a federal question, a court must look to the complaint as it existed at the time the petition for removal was filed. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1277 (6th Cir. 1991) (citing *Pullman Co. v. Jenkins*, 305 U.S. 534 (1939)). In order for jurisdiction to be founded upon a cause of action arising under the Constitution or federal law " 'a right or immunity created by the Constitution or laws of the United States must be

an element, and an essential one, of the plaintiffs cause of action.' " *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10-11 (1983) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936)), *see also Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 585 (6th Cir. 1990).

We find that plaintiff's complaint, as set out in this opinion, contains allegations sufficient to confer subject matter jurisdiction upon the district court. At the time the removal petition was filed, the complaint, on its face, alleged within each state law tort count a claim that Balas' rights as guaranteed by the federal constitution had been violated by defendants while acting under color of authority vested in them by state law. Although the complaint does not specifically reference 42 U.S.C. § 1983, we can discern no other purpose for inclusion of this language than to present a cause of action based upon that statute.

Balas correctly points out that for purposes of determining the existence of a federal question the court must recognize that he is the master of his own complaint and that jurisdiction may not be sustained on a theory he has not advanced. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809 (1986). Yet this rule does not compel a finding of no jurisdiction in this case. We reject plaintiff's contention that the language quoted from his complaint was nothing more than "a legally superfluous reference to [his] constitutional rights." Rather, we find that plaintiff consciously alleged deprivation by a state officer of rights guaranteed him by the federal Constitution. This alleged deprivation is the very heart of this action, notwithstanding that plaintiff casts the effect of

that deprivation in terms of state tort remedies. Therefore, we conclude that the district court was vested with subject matter jurisdiction over this action such that removal was properly granted.

III.

We review *de novo* the district court's determination of defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *G.M. Eng'rs and Assoc. v. West Bloomfield Township*, 922 F.2d 328, 330 (6th Cir. 1990). We apply the same standard of review for defendants' summary judgment motion. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is only appropriate when the nonmoving party fails to establish a genuine issue of material fact on an essential element to his case and on which he would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In making that determination, we view the evidence in the record in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). We conclude, as did the district court, that the instant case can neither be dismissed under Fed. R. Civ. P. 12(b)(6) nor disposed of by summary judgment under Fed. R. Civ. P. 56(c).

The crux of our analysis of either summary procedure is whether defendants, as bailiffs of the municipal court, were entitled to derivatively assume Judge Donaldson's absolute judicial immunity. If defendants are so entitled, then dismissal is the appropriate remedy.

Every person acting under color of state law is subjected by section 1983 to liability for the deprivation of

any other person's rights, privileges, or immunities secured by the federal Constitution. 42 U.S.C. § 1983. However, section 1983 does not abolish common law immunities. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1945 (1991) (Scalia, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986)):

> Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions."

The question whether immunity will attach in a section 1983 action is entirely one of federal law. *Martinez v. California*, 444 U.S. 277, 284 (1980).

It is well settled that judges, in the performance of their judicial functions, are absolutely immune from civil liability. *Stump v. Sparkman*, 435 U.S. 349, 363 (1978). Whether a judge or some other official is entitled to absolute immunity in a given case turns on a "functional" analysis. *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982). The touchstone for applicability of absolute judicial immunity is "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Burns*, 111 S. Ct. at 1946 (Scalia, J., concurring). Absolute judicial immunity has been only "quite sparingly" recognized, *id.* at 1939 (Opinion of the Court), and the official seeking immunity must show that such immunity is justified for the governmental function

at issue. *Hafer v. Melo*, ___ U.S. ___, 112 S. Ct. 358, 363 (1991).

Federal officers, other than judges to whom a form of judicial immunity has been found to attach (quasi-judicial immunity), include hearing officers and administrative law judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978). The Court has also extended the defense to state prosecutors and state parole officers, but taken pains to point out that immunity will only cloak functions performed by such officers which are judicial in nature. *Imbler v. Pachtman*, 424 U.S. 409 (1976). While the Court found that a prosecutor is entitled to immunity for performance of advocacy functions, the Court left open the question whether such immunity should be afforded to the prosecutor in his role as administrator or investigator. *Id.* at 430-31. The Court has stated its reluctance to grant absolute immunity to those not "intimately associated with the judicial phase of the criminal process." *Id.* at 430.

Thus, we have held that absolute immunity did not shield a state social worker from section 1983 liability when that individual initiated a child abuse investigation. The decision to open an investigation – notwithstanding the possibility that the investigation could lead to criminal charges – was entirely "investigatory or administrative in nature, not prosecutorial, judicial or otherwise intimately related to the judicial process." *Achterhof v. Selvaggio*, 886 F.2d 826, 830 (6th Cir. 1989).

When determining whether someone should be employed or continued as a probation officer or equivalent, or be selected to counsel or supervise a criminal defendant, the judge is not acting in a judicial capacity

and the court personnel who perform that function are not acting in a quasi-judicial capacity. Most of the activity complained of in this case falls into this category. Thus, to the extent they were investigating Balas, there is no absolute immunity. However, when a judge seeks to determine whether a defendant is complying with the terms of probation, the judge is performing a judicial function. To the extent court personnel were investigating whether Weiner was complying with the terms of his probation, they were performing a quasi-judicial function. To the extent defendants were performing that function at the direction of the judge, they are entitled to quasi-judicial immunity. All of the same considerations that would apply to the judge apply to the probation officer. "The prospect of damage liability under section 1983 would seriously erode the officer's ability to carry out his independent fact-finding function and thereby impair the sentencing judge's ability to carry out his judicial duties." *Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1986) (finding absolute immunity for probation officers).

The trial court was correct in denying the motion to dismiss or for summary judgment based on the record before it, and in holding that further development of the facts would be essential to determining what, if any, parts of the alleged acts were entitled to absolute immunity.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD BALAS,

Plaintiff,

v.

KATHLEEN LEISHMAN-DONALDSON, et al.,

Defendants.

CASE NO. 1:91CV0623

Judge John M. Manos

MEMORANDUM OF OPINION

[Issued 10/16/91]

Plaintiff, Ronald Balas, filed the above-captioned case against defendants the city of Shaker Heights and three individuals[1] who serve as bailiffs for the Shaker Heights Municipal Court. Balas alleges that an investigation conducted by the bailiffs unlawfully abridged rights guaranteed to him under federal and state law. The complaint, originally filed in state court, alleges claims of invasion of privacy, abuse of process, malicious prosecution, defamation, intentional interference with employment, conspiracy, and intentional infliction of emotional distress. On

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[1] The individual defendants, Kathleen Leishman-Donaldson, William DiGiovanni, and John Becker, are each sued in their individual and official capacities. Leishman-Donaldson is the Chief Bailiff and the wife of Shaker Heights Municipal Judge Paul Donaldson.

April 3, 1991, the defendants removed the complaint because the invasion of privacy claim charging that the defendants "unlawfully . . . abridged rights secured to him by the Constitution of the United States . . . under color of law" constitutes an alleged violation of 42 U.S.C. § 1983. Accordingly, jurisdiction in this court is appropriate pursuant to 28 U.S.C. §§ 1331, 1343. On August 23, 1991, the defendant bailiffs moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or for summary judgment pursuant to Fed. R. Civ. P. 56 based on the defense of absolute immunity. For the following reasons, the motion is denied.

I.

The defendants argue that the court should dismiss the complaint or grant summary judgment because they conducted the investigation of Balas pursuant to the orders of Shaker Heights Municipal Judge Paul Donaldson and are therefore entitled to absolute immunity. On December 19, 1989, Balas appeared before the court at a sentencing hearing for Joel Weiner who had been found guilty of driving while intoxicated. Defendant's Motion for Summary Judgment, *Balas v. Leishman-Donaldson, et al.* Case No. 1:91CV0623 at 6 (filed Aug. 23, 1991). At this hearing, Balas represented to the court that he had a Ph.D. in psychology and that his agency was certified in alcohol counselling. *Id.* at 7. Based on these representations, Judge Donaldson permitted Balas to counsel Joel Weiner. *Id.* at 6. After Weiner was sentenced, the court ordered an investigation to verify Balas' credentials. The defendants allege that they acted appropriately in pursuing the investigation and are immune from liability.

Balas alleges that the bailiffs had no authority to conduct a sentencing investigation of him before charging him with a crime. He asserts that he was hired by Judge Donaldson and his wife Kathleen Leishman-Donaldson to counsel her sister who had a thirteen-year-old daughter soon to be released from a psychiatric institution. Complaint, *Balas v. Leishman-Donaldson, et al.* Case No. 1:91CV0623 at 4 (removed Apr. 3, 1991). Balas was also asked to find an alternative psychiatric institution for the child. Complaint at 4. The child's psychiatrist informed Balas about his suspicion that the child had been sexually abused. Complaint at 6-7. On January 4, 1990, Balas discussed this suspicion with the child's mother. Complaint at 7. After that conversation, Leishman-Donaldson initiated an investigation of Balas.[2] She scheduled a hearing[3] for which she issued a criminal summons to anyone she could locate who knew him. Complaint at 12. Balas further alleges that during the course of the investigation, she disseminated defamatory information about him to members of the community and the press. Complaint at 12-13.

Balas argues that absolute immunity cannot attach to the bailiffs' acts because they acted pursuant to Leishman-Donaldson's direction, independent of any court

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[2] The first incident of the investigation allegedly occurred on January 9, 1990 when Leishman-Donaldson contacted Orville Theodore McCormac, an attorney and psychologist who was asked whether Balas was authorized to sign health care provider forms. Complaint at 7.

[3] The hearing was scheduled for March 6, 1990. Complaint at 11.

order, and outside the scope of their statutory authority.[4] He alleges that the bailiffs illegally usurped judicial powers and that their purpose was not to discover facts about him, but to destroy his reputation in retaliation for informing Leishman-Donaldson's sister about suspected sexual abuse of her daughter. He seeks to prove that the investigation was not conducted for any legitimate fact-finding purpose, but was a personal vendetta to "distort facts and disseminate rumors, innuendos, hearsay, half-truths and lies." Plaintiff's Brief in Opposition to Motion of Defendant Bailiffs to Dismiss or in the Alternative for Summary Judgment, *Balas v. Leishman-Donaldson, et al.* Case No. 1:91CV0623 at 33 (filed Sept. 16, 1991).

II.

Section 1983 subjects every person acting under color of state law to liability for depriving any other person of rights, privileges, or immunities secured by the United

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[4] Balas cites O.R.C. §§ 1901.32, 311.07 to support his argument that the bailiffs had no authority to act as an independent investigatory arm of the municipal court. O.R.C. § 1901.32(A)(6) provides in part:

> The bailiff and deputy bailiffs shall perform for the court services similar to those performed by the sheriff for the court of common pleas, and shall perform any other duties that are requested by rule of court.

O.R.C. § 311.07 provides in part:

> A sheriff or deputy sheriff of a county may participate, as the director of an organized crime task force . . . or as a member of the investigatory staff of such a task force, in an investigation of organized criminal activity in any county or counties in this state. . . .

States Constitution and federal laws. 42 U.S.C. § 1983. Despite the broad language of this statute, the Supreme Court has consistently held that section 1983 does not abolish common law immunities. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1938 (1991). However, the Court has been "quite sparing" in recognizing absolute immunity. *Id.* at 1939.

Whether immunity attaches in a Section 1983 action is a question of federal law. See *Wood v. Strickland*, 420 U.S. 308 (1975). This is so even if the suit was originally filed in state court. *Martinez v. California*, 444 U.S. 277, 285, n. 8 (1980).

Under federal law, judges are absolutely immune from suits seeking monetary damages for judicial acts. *Stump v. Sparkman*, 435 U.S. 349 (1978). The absolute immunity of a judge also protects judicial clerks for acts which are judicial in nature or are conducted pursuant to the orders of a judge. *Morrison v. Jones*, 607 F.2d 1269 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980); *Waits v. McGowan*, 516 F.2d 203, 206 (3rd Cir. 1975); *Shipley v. First Fed. Sav. & Loan Assn.*, 619 F. Supp. 421 (D.Del. 1985), *aff'd*, 877 F.2d 57 (3rd Cir. 1989); *DeFerro v. Coco*, 719 F.Supp. 379 (E.D.Pa. 1989). When a lower federal officer exercises judgment in a manner comparable to the function of a judge, the officer is afforded "quasi-judicial" absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 424, n. 20 (1976). Absolute immunity does not, however, protect federal officers when they are acting in an investigative or administrative capacity. *Id.* at 431.

In order to establish entitlement to absolute immunity, defendants "bear the burden of showing that such

immunity is justified for the function in question. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1939 (1991).

Whether immunity attaches to the pendent state law claims is a question of state law. *See Willitzer v. McCloud*, 453 N.E.2d 693 (Ohio 1983). The Supreme Court of Ohio indicated that in order to protect the integrity of the judicial process, "judges, counsel, parties, and witnesses are absolutely immune from civil suits for defamatory remarks made during and relevant to judicial proceedings." *Id.* at 695. Although judges and quasi-judicial officers are entitled to absolute immunity, this protection "does not extend to . . . investigative or administrative functions." *Id.* at 695 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)).

III.

In considering a motion to dismiss, the court must interpret the facts in the light most favorable to the plaintiff in order to determine whether any set of facts would entitle him to relief. *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990). Balas articulates facts which, if proven, would preclude the defense of absolute immunity. Therefore, the motion to dismiss is denied.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If the bailiffs acted in a quasi-judicial function or under direction of Judge Donaldson, they would be entitled to absolute immunity. This protection would not apply if they acted in an investigative role, an administrative capacity or without authority. Whether the bailiffs acted in a manner which would entitle them to absolute immunity is a question of fact which is not appropriate for disposition on summary judgment. Accordingly, the motion is denied.

IT IS SO ORDERED.

JOHN M. MANOS
UNITED STATES DISTRICT
JUDGE

APPENDIX C

OHIO STATUTORY PROVISIONS INVOLVED

OHIO REV. CODE ANN. § 1901.13 (Page 1983 and Supp. 1991) provides, in pertinent part:

> In any action or proceeding of which a municpal court has jurisdiction, the court or any judge thereof has power:
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> (A) To issue process, preserve order, and punish contempts, . . . and to exercise such other powers as are necessary to give effect to the jurisdiction of the court and to enforce its judgments, orders, or decrees; . . .

OHIO REV. CODE ANN. § 1901.21(A) (Page 1983 and Supp. 1991) provides, in pertinent part:

> (A) In a criminal case or proceeding, the practice, procedure, and mode of bringing and conducting prosecutions for offenses [in municipal courts] shall be as provided in the criminal rules, and the power of the court in relation to the prosecution is the same as the power that is conferred upon county courts.

OHIO REV. CODE ANN. § 1901.32 (Page 1983 and Supp. 1991) provides in pertinent part:

> (A) The bailiffs and deputy bailiffs of a municipal court shall be provided for, and their duties are as follows:
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> (6) The bailiff and deputy bailiffs shall perform for the court services similar to those performed by the sheriff for the court of common pleas, and shall perform any other duties that are requested by rule of court.

OHIO REV. CODE ANN. § 1907.18(B) (Page 1983 and Supp. 1991) provides:

> (B) County court judges may punish contempts, and exercise powers necessary to give effect to the jurisdiction of the court and to enforce its judgments, orders, and decrees, as provided in this chapter or, in the absence of a provision in this chapter, in a manner authorized by the Revised Code or common law for the judges of the courts of common pleas.

OHIO REV. CODE ANN. § 3793.10 (Page 1992) provides, in pertinent part:

> A drivers' intervention program may be used as an alternative to a term of imprisonment for an offender sentenced pursuant to division (A)(1) of section 4511.99 of the Revised Code [prohibiting driving under the influence of alcohol or drugs], if it is certified by the director of alcohol and drug addiction services pursuant to this section. . . .
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> . . . The rules [establishing minimum standards for approved programs] shall include, but are not limited to, standards governing program course hours and content, qualifications of program personnel, methods of identifying and testing participants to isolate participants with alcohol and drug abuse problems, referral of such persons to alcohol and drug addiction programs, the prompt notification of courts by program operators of the completion of the programs by persons required by courts to attend them, and record keeping, including methods of tracking participants for a reasonable time after they have left the program.

OHIO REV. CODE ANN. § 4511.99(A)(7) (Page 1990 and Supp. 1991) provides:

> (7) No court shall sentence an offender to an alcohol treatment program . . . unless the treatment program complies with the minimum standards adopted pursuant to Chapter 3793 of the Revised Code by the director of alcohol and drug addiction services.